

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4183

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and ITT WORLD COMMUNICATIONS INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY and TRT TELECOMMUNICATIONS
CORPORATION,

Intervenors.

On Petition for Review of
Decision and Order of the
Federal Communications Commission

BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.

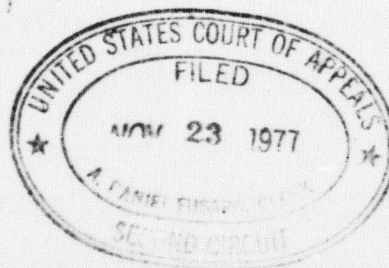
Of Counsel:

Grant S. Lewis
John S. Kinzey

and

Howard A. White
Joseph J. Jacobs
Randall B. Lowe
ITT World Communications Inc.
67 Broad Street
New York, New York
(212) 797-3300

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Petitioner
ITT World Communications Inc.
140 Broadway
New York, New York 10005
(212) 269-1100



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and ITT WORLD COMMUNICATIONS INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY and TRT TELECOMMUNICATIONS
CORPORATION,

Intervenors.

On Petition for Review of
Decision and Order of the
Federal Communications Commission

BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.

Of Counsel:

Grant S. Lewis
John S. Kinzey

and

Howard A. White
Joseph J. Jacobs
Randall B. Lowe
ITT World Communications Inc.
67 Broad Street
New York, New York
(212) 797-3300

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Petitioner
ITT World Communications Inc.
140 Broadway
New York, New York 10005
(212) 269-1100

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ADDITIONAL ISSUES PRESENTED FOR REVIEW.....	3
STATEMENT OF THE CASE.....	3
POINT I: THE FCC HAS WRONGLY ABROGATED THE IRCS' CONTRACTS WITH AT&T.....	7
A. The FCC Has No Express Statutory Authority To Regulate Inter-carrier Contracts.....	7
B. Assuming the FCC Has Statutory Authority to Abrogate The IRCS' Leases, It Has Not Made The Necessary Finding That The Public Interest Requires Abrogation.....	11
POINT II: THE PROCEDURES EMPLOYED BY THE FCC WERE INADEQUATE.....	13
A. The FCC Has Failed To Develop An Adequate Record.....	14
B. The FCC Has Erroneously Placed The Burden on the IRCS to Prove Matters Beyond Their Knowledge.....	17
C. The FCC's Remedy for the "Discrimination" It Purportedly Found Was Erroneous and Unsupported By The Necessary Findings.....	18
CONCLUSION.....	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Alabama Power Co. v. F.P.C.</u> , 511 F.2d 383 (D.C. Cir. 1974).....	16
<u>American Telephone & Telegraph Co. v. F.C.C.</u> , 487 F.2d 865 (2nd Cir. 1973).....	12
<u>Anglo-Canadian Shipping Co., Ltd. v. F.M.C.</u> , 310 F.2d 606 (9th Cir. 1962).....	17
<u>Appalachian Power Co. v. E.P.A.</u> , 477 F.2d 495 (4th Cir. 1973).....	15
<u>Bell System Tariff Offerings</u> , 46 F.C.C. 2d 413 (1974), <u>aff'd</u> , <u>sub nom.</u> <u>Bell Telephone</u> <u>Company of Pennsylvania v. F.C.C.</u> , 503 F.2d 1250 (3rd Cir. 1974), <u>cert. den.</u> , 422 U.S. 1026 (1975).....	7,20-22
<u>Burlington Truck Lines, Inc. v. United</u> <u>States</u> , 371 U.S. 156 (1962).....	19
<u>C.A.B. v. Delta Airlines, Inc.</u> , 367 U.S. 316 (1961).....	8
<u>Citizens of Allegan County v. F.P.C.</u> , 414 F. 2d 1125 (D.C. Cir. 1969).....	19
<u>City of Chicago v. F.P.C.</u> , 458 F.2d 731 (D.C. Cir. 1971), <u>cert. den.</u> , 405 U.S. 1072.....	15
<u>City of Huntingburg v. F.P.C.</u> , 498 F. 2d 778 (D.C. Cir. 1974).....	19
<u>Copley Press, Inc. v. F.C.C.</u> , 444 F.2d 984 (D.C. Cir. 1971).....	17
<u>F.P.C. v. Sierra Pacific Power Co.</u> , 350 U.S. 348 (1956).....	11
<u>Gulf States Utility Co. v. F.P.C.</u> , 518 F.2d 450 (D.C. Cir. 1975).....	11

<u>Cases</u>	<u>Page</u>
<u>Municipal Electric Utility Ass'n. v. F.P.C.</u> , 485 F.2d 967 (D.C. Cir. 1973).....	11
<u>Nader v. F.C.C.</u> , 520 F.2d 182 (D.C. Cir. 1975).....	12
<u>National Association of Indep. Tel. Prod. & Dis. v. F.C.C.</u> , 502 F.2d 249 (2nd Cir. 1974).....	16
<u>Office of Communications of United Church of Christ v. F.C.C.</u> , 425 F.2d 543 (D.C. Cir. 1969).....	15,17
<u>Public Service Co. of New Mexico v. F.P.C.</u> , 557 F.2d 227 (10th Cir. 1977).....	11
<u>RCA Global Communications, Inc. v. F.C.C.</u> , 559 F.2d 881 (2nd Cir. 1977).....	12,14
<u>Regents of University System of Ga. v. Carroll</u> , 338 U.S. 586(1950).....	7
<u>Reliance Electric Co. v. Emerson Electric Co.</u> , 404 U.S. 418 (1972).....	9
<u>Resale and Shared Use of Common Carrier Services and Facilities</u> , 60 F.C.C. 2d 261, 62 F.C.C. 2d 588(1976).....	4
<u>Rhode Island Consumers Council v. F.P.C.</u> , 504 F.2d 203 (D.C. Cir. 1974).....	15
<u>Richmond Power and Light v. F.P.C.</u> , 481 F.2d 490 (D.C. Cir.), <u>cert. den.</u> , <u>sub. nom.</u> <u>Indiana & Michigan Electric Co. v. F.P.C.</u> , 414 U.S. 1068 (1973).....	11
<u>Scenic Hudson Preservation Conference v. F.P.C.</u> , 354 F.2d 608 (2nd Cir. 1965), <u>cert. den.</u> , 383 U.S. 911 (1966).....	
<u>United Gas Pipe Line Co. v. Mobile Gas Service Corp.</u> , 350 U.S. 332 (1956).....	11
<u>United Housing Foundation, Inc. v. Forman</u> , 421 U.S. 837 (1975).....	9

<u>Cases</u>	<u>Page</u>
<u>Walter Holm & Co. v. Hardin</u> , 449 F.2d 1009 (D.C. Cir. 1971).....	15
 <u>Statutes</u>	
Communications Act of 1934, as amended, 47 U.S.C. §151 <u>et seq.</u>	
Part II, §§201-223.....	7,8
Part III, §§301-399.....	7
Section 202(a).....	16
Section 204.....	19
Section 205.....	19
Section 215.....	8
 Federal Aviation Act, 49 U.S.C. §1382.....	8
 Federal Power Act, 16 U.S.C. §§824, 824(a)-924(h).....	8
 Natural Gas Act, 15 U.S.C. §§717, 717(o)-717(w).....	8
 <u>Other Material</u>	
<u>Hearings on H.R. 10270 before the Committee on Interstate and Foreign Commerce of the House of Representatives</u> , 88th Cong., 2nd Sess. (1964).....	9,10

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and ITT WORLD COMMUNICATIONS INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY and TRT TELECOMMUNICATIONS
CORPORATION,

Intervenors.

On Petition for Review of
Decision and Order of the
Federal Communications Commission

BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.

Petitioner ITT World Communications Inc. ("ITT
Worldcom") submits this Brief in support of its Petition for
Review.

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, petitioners Western Union International, Inc. and RCA Global Communications, Inc. are submitting a joint brief in this consolidated proceeding. The arguments set forth in that joint brief demonstrate that the FCC's Decision and Order should be vacated. ITT Worldcom will not repeat those arguments in this brief, but will instead advance additional reasons why the FCC's Decision and Order must be reversed by the Court.

ITT Worldcom's Brief will be limited to two points. First, as demonstrated herein, the FCC's decision to abrogate the lease agreements between AT&T and the IRs raises a fundamental question of the FCC's statutory authority to regulate inter-carrier contracts. Assuming arguendo that the FCC has this authority, the law is clear that the FCC may not interfere with the carriers' private contractual arrangements unless it has first found that abrogation of the contracts is necessary to protect the public interest. No such finding was made here, and the FCC's Decision and Order should be reversed for this reason alone.

As the second point of this brief, ITT Worldcom further discusses the inadequacies of the procedures employed by the FCC. While ITT Worldcom fully supports the argument that the IRCs were denied the adequate hearing required by law, as set forth in the joint brief, ITT Worldcom also wishes to

submit a somewhat different analysis of the FCC's procedural errors, which would lead the Court to reverse the FCC without the necessity of deciding all of the issues raised in the joint brief.

STATEMENT OF ADDITIONAL ISSUES
PRESENTED FOR REVIEW

1. Whether the FCC has statutory authority to regulate inter-carrier contracts, and if so, whether it made the necessary finding that abrogation of the AT&T-IRC leases was necessary to protect the public interest.

2. Whether, in the circumstances of this case, the procedures followed by the FCC were sufficient to support the FCC's Decision and Order.

STATEMENT OF THE CASE

The FCC proceedings which led to the Decision and Order are fully described in the joint brief of RCA Globcom and WUI. This statement of facts will therefore be limited to a short discussion of the factual basis for ITT Worldcom's assertion, see p. 13, infra, that the FCC's actions in this case were not taken in furtherance of the FCC's statutory duty to represent the public interest, but rather were the actions of an administrative agency that was motivated solely by a bureaucratic passion for symmetry which led the FCC to treat

the IRCs and the domestic carriers identically despite the numerous differences in their businesses and circumstances.*

It should first be emphasized that the AT&T-IRC lease agreements which are at issue here are contracts negotiated at arms' length between independent carriers. These leases settled a controversy between AT&T and the IRCs which arose when the IRCs informed AT&T that they would ask the FCC to permit the IRCs to share ownership interests ("IRUs") in the entrance or "tail" circuits which AT&T supplied them, just as they shared ownership interests in the overseas cables to which the tail circuits were connected. (JA 195) The lease agreements which settled this controversy permitted AT&T to avoid the possibility that the FCC might direct it to sell IRUs to

* This is not the first case in which the FCC has arbitrarily attempted to regulate the IRCs in precisely the same way it regulates domestic carriers despite the differences between the international and domestic communication industries. In Resale & Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), the FCC released an 80-page opinion which permitted subscribers to certain common-carrier services to obtain those services jointly, or resell them to other parties. Virtually the entire opinion was concerned with the domestic industry. However, after a cursory one-paragraph discussion, 60 F.C.C.2d at 295-96, the FCC decided that its decision would be fully applicable to the IRCs as well as the domestic carriers. After a number of the IRCs petitioned for reconsideration, the FCC recognized that its domestic policies on resale and shared use should not be applied to the IRCs without further investigation. 62 F.C.C.2d 588, 593.

the IRCs, but at the same time, allowed the IRCs to obtain the lower cost for their tail circuits which they would have enjoyed if the FCC had given them ownership interests in those circuits. (JA 31) The AT&T-IRC leases therefore served the public interest, since they permitted the IRCs to obtain the connecting circuits they required to serve the public at the least possible cost.

Secondly, it should be noted that the FCC had demonstrated its firm intention to require AT&T to provide the IRCs' tail circuits pursuant to tariff even before it commenced the "investigation" which purportedly led to the Decision and Order. On June 6, 1974 (11 months before the FCC initiated its investigation), the Chief of the FCC's Common Carrier Bureau, Walter Hinchman, wrote a letter to AT&T in which the FCC simply directed AT&T to file tariffs covering the IRC entrance circuits. (JA 37) This direction was made without giving any of the interested carriers an opportunity to be heard or to justify the existing contractual arrangements. It was only after AT&T refused to file the requested tariffs voluntarily, (JA 47), that the FCC initiated a proceeding to investigate the very question it had answered in the Hinchman letter, namely, whether AT&T should be ordered to provide the IRCs' tail circuits pursuant to tariffs filed with the Commission. (JA

61) The conclusion is inevitable that the FCC's "investigation" was not intended to develop a factual record leading to an impartial decision but was rather viewed by the FCC as nothing more than a legal formality which was necessary before the FCC could implement its earlier decision to require tariffs for the IRCs' tail circuits.

Thirdly, it is significant that AT&T and the IRCs were unanimous in agreeing that the existing leasing agreements satisfied all the carriers, and served the public well. (JA 72, JA 76, JA 93, JA 99) It is equally significant that no other party raised a legitimate criticism of the IRCs' leases.* The domestic carriers which were the ostensible victims of the discrimination in rates that the FCC purported to find had not only failed to submit any pleadings in the FCC proceeding which indicated that they had been injured by the IRCs' arrangements with AT&T, but had actually recognized, in the settlement agreement which terminated a prior Commission proceeding, the "unique" nature of the IRCs' tail circuit requirements. (JA 57) On this record, ITT Worldcom submits that the FCC could not properly find that abrogation of the IRCs' leases was required by the public interest, and that the only rationale for the FCC's actions was the Commission's unexplained

* As noted in the joint brief, Comsat General Corp. raised a question concerning the IRCs' leases which, the FCC ultimately recognized, was based on an erroneous factual premise. (JA 704, n. 16)

determination to force the IRCs' lease agreements into the same regulatory pattern as AT&T's tariffs for domestic carriers. In short, the FCC decided that AT&T should file tariffs covering the IRCs' tail circuits for no more compelling a reason than the fact that AT&T was offering interconnection facilities to the domestic carriers pursuant to tariff.

POINT I: THE FCC HAS WRONGLY ABROGATED THE IRCs' CONTRACTS WITH AT&T.

A. The FCC Has No Express Statutory Authority To Regulate Inter-carrier Contracts.

A threshold question presented to the Court is whether the FCC has statutory authority to regulate inter-carrier contracts for the exchange of communication services. The Communications Act contemplates and permits carriers to enter into agreements among themselves, but does not expressly authorize the FCC to regulate such contracts. Bell Telephone Company of Pennsylvania v. F.C.C., 503 F.2d 1250, 1278-79 (3rd Cir. 1974), cert. den., 422 U.S. 1026 (1975).^{*} The FCC purports

^{*} The question of the FCC's jurisdiction over inter-carrier contracts was raised by AT&T in Bell Telephone Company of Pennsylvania v. F.C.C., supra, but the court found it unnecessary to resolve the issue in view of its disposition of the case. 503 F.2d at 1279.

Although the question of whether the FCC has power to regulate common-carrier contracts under Part II of the Communications Act has not been resolved by the courts, the Supreme Court has held that the FCC's general grant of jurisdiction to regulate the broadcasting industry, set forth in Part III of the Act, does not empower the FCC to invalidate private contracts between broadcast licensees and third parties. Regents of University System of Ga. v. Carroll, 338 U.S. 586, 600 (1950).

to find "implicit" authority under the Communications Act to regulate inter-carrier contracts, but points to nothing in the legislative history of the Act which would support such an inference.

It is fundamental that the Commission's jurisdiction extends only so far as the relevant enabling statute permits. C.A.B. v. Delta Airlines, Inc., 367 U.S. 316, 322 (1961).¹ If that statutory permission is said to be implicit, reasons must exist to infer Congressional intent. There are no such reasons present in the case of the Communications Act. In contemporaneous legislation establishing other regulatory agencies, Congress explicitly granted authority to regulate private contracts.* In contrast, the Communications Act contains no such authorization, even though the text of the Communications Act is similar in many respects to these other regulatory statutes. The absence of an express grant of statutory authority is therefore a strong indication that Congress did not intend to delegate power to the FCC to regulate inter-carrier contracts.

This interpretation of the Communications Act is further strengthened by Congress' inclusion of Section 215 in

* Compare, with Part II of the Communications Act, the similar provisions of the Federal Power Act, 16 U.S.C. §§824, 824(a)-824(h), enacted in 1935, and of the Natural Gas Act, 15 U.S.C. §§717, 717(o) - 717(w), enacted in 1938. See also, the Federal Aviation Act, 49 U.S.C. §1382, enacted some years later in 1958.

the Act, in which Congress directed the Commission to "examine into transactions entered into by any common carrier which relate to the furnishing of ... services", and to report to Congress whether "legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest...." Obviously, Congress would not have required the FCC to report on the need for additional legislation authorizing it to regulate carriers' contracts if the Communications Act were intended to grant that very power to the FCC.

The FCC has itself previously taken the position that it lacks statutory authority to abrogate inter-carrier contracts.* In 1964, the FCC asked Congress to add a new Section 223 to the Communications Act which would give the Commission the power to regulate private arrangements between carriers to provide interconnection services. See Hearings on H.R. 10270 before the Committee on Interstate and Foreign Commerce of the House of Representatives, 88th Cong., 2d Sess. (1964). In its memorandum to Congress explaining the need for this legislation,

* Where, as here, an agency's current interpretation of its governing statute is contradicted by the agency's previously expressed views, the agency's statutory interpretation is not entitled to any particular deference from the courts. United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858 n. 25 (1975); Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 426 (1972).

the Commission described its existing lack of authority in the following terms:

"Since, under the Communications Act, the provision of facilities by one common carrier to another common carrier is not regarded as a common carrier undertaking, the Commission has no regulatory authority over the charges and other terms and conditions in arrangements between such carriers for the interchange of their communications facilities or in arrangements regarding the furnishing of facilities or services by one communications common carrier to another." Hearings, supra, p. 9-10.*

In his appearance before the House Committee in support of the proposed legislation, FCC Commissioner Hyde made the same point:

"It is the opinion of the Commission that it now lacks clear statutory authority to regulate the provision of communication services and facilities by one carrier to another." Hearings at p. 24.

Despite the FCC's pleas for additional authority to regulate inter-carrier contracts, Congress failed to enact the proposed Section 223. It is thus evident that the Commission is on tenuous ground jurisdictionally in its attempts to modify the AT&T-IRC leases.

* The FCC explicitly recognized that its lack of statutory authority would prevent it from eliminating discrimination of the type it purported to find here, Hearings at p. 10, and used this fact as an argument in favor of the new legislation.

B. Assuming the FCC Has Statutory Authority to Abrogate The IRCs' Leases, It Has Not Made The Necessary Finding That The Public Interest Requires Abrogation

This Court need not reach the question of whether the Commission has authority to invalidate private agreements between carriers. For even in those cases in which an administrative agency is expressly authorized by statute to regulate contracts, the agency may not interfere indiscriminately with the bargain which the private parties have struck. To the contrary, it is well established that an agency may modify or abrogate private contracts only after the agency has found that such modification or abrogation is necessary to protect the public interest. F.P.C. v. Sierra Pacific Power Co., 350 U.S. 348 (1956), United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).*

Here, the FCC has failed to demonstrate that the public interest requires the abrogation of the AT&T-IRC leases. Nor is there any readily-apparent public benefit which will result from the FCC's Decision and Order. To the contrary, the IRCs and, indirectly, their customers will incur additional

* Accord, Public Service Co. of New Mexico v. F.P.C., 557 F.2d 227 (10th Cir. 1977); Gulf States Utility Co. v. F.P.C., 518 F.2d 450 (D.C. Cir. 1975); Municipal Electric Utility Ass'n. v. F.P.C., 485 F.2d 967 (D.C. Cir. 1973); Richmond Power and Light v. F.P.C., 481 F.2d 490 (D.C. Cir.), cert. den., sub. nom. Indiana & Michigan Electric Co. v. F.P.C., 414 U.S. 1068 (1973).

costs as a result of the FCC's actions, but the domestic carriers--the "victims" of the discrimination which the FCC has purportedly discovered -- will not be helped in the slightest if the IRCs are forced to increase their payments to AT&T.* Under these circumstances, the FCC has either ignored the public interest, or considered it in a most superficial and conclusory way, see, RCA Global Communications, Inc. v. F.C.C., 559 F.2d 881, 891 (2nd Cir. 1977), and its abrogation of the IRC-AT&T leases must be reversed.**

* The case might be different if the domestic carriers competed with the IRCs and were placed at a competitive disadvantage as a result of the "preference" which the IRCs are supposedly receiving. However, since the domestic carriers do not in fact compete internationally the rates which AT&T charges the IRCs are of no concern to them, as demonstrated by their failure to participate in the FCC proceeding which led to the Decision and Order.

** The FCC cannot evade its responsibility to make public-interest findings by arguing, as it attempted to do in its Order, that it had not abrogated the AT&T-IRC leases, because it purportedly permitted AT&T to choose the manner in which the "discrimination" it had found would be eliminated (JA 695). It is the substance of what the Commission has done which is significant, not the way in which the agency chooses to characterize its actions. See American Telephone & Telegraph Co. v. F.C.C., 487 F.2d 865 (2nd Cir. 1973); Nader v. F.C.C., 520 F.2d 182 (D.C. Cir. 1975). In finding the rate specified in the AT&T-IRC leases to be unlawfully discriminatory, the FCC clearly abrogated or modified the parties' contracts to that extent, regardless of the FCC's claims to the contrary. Moreover, as a practical matter, the FCC's Decision and Order left AT&T no choice except to terminate its contracts with the IRCs and charge them the same rates as those specified in the OCC tariffs, as is fully discussed in the other petitioners' joint brief.

In short, the FCC's Order and Decision have terminated a long-standing contractual relationship which was satisfactory to the carriers, which has served the public well, and which has not been challenged by any interested third party. Even if the Communications Act permits the FCC to interfere with private contracts when interference is necessary to protect the public, it does not authorize the FCC to abrogate carriers' contracts for reasons no more compelling than the agency's bureaucratic desire to simplify its own regulatory responsibilities by arbitrarily treating two dissimilar situations in an identical way.

POINT II. THE PROCEDURES EMPLOYED BY
THE FCC WERE INADEQUATE

In their joint brief, the other petitioners have discussed a number of deficiencies in the FCC procedures which led to the Decision and Order. Some of the issues raised in the joint brief, such as the nature of the hearing required and the allocation of the burden of proof in rate-discrimination cases, have significance beyond the instant appeal. While ITT Worldcom fully supports the arguments on these issues advanced in the joint brief, the Court may prefer to reverse the FCC on more limited grounds which arise from the circumstances of this

particular case.* ITT Worldcom submits that without an extensive consideration of the procedural standards which might apply in other cases, the Court can properly decide that the FCC must be reversed because in the circumstances of this particular proceeding (a) the FCC has not developed an adequate record to decide the issues presented to it, (b) the FCC's allocation of the burden of proof was erroneous and (c) the FCC's choice of remedies is unsupported by the necessary findings and is unrelated to the danger which the FCC was purporting to correct.

A. The FCC Has Failed To Develop
An Adequate Record.

The Court need not now decide the sort of hearing to which petitioners would be entitled in all circumstances. For whatever the discretion an agency may have to choose among different forms of procedure, it is now firmly established that the agency must adopt procedures that are adequate to resolve the issues which are presented to it in the particular case at

* As the Court observed in RCA Global Communications, Inc. v. F.C.C., supra, 559 F.2d at 886:

"The emphasis, today, in the absence of a specific statutory directive as to the requisite form of hearing, is on the requirements of the particular case, not on formalistic interpretations of statutory words, and not on the equally formalistic and often circular distinction between adjudication and rule-making."

hand.* At the minimum, the agency has an affirmative duty to develop a full factual record which will permit it to reach an informed decision:

"This Court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties.... The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965), cert. den., 383 U.S. 911 (1966).**

To determine whether the FCC has met its "affirmative duty" to insure that the record is complete, the Court need only examine the issues which the FCC purported to resolve. ITT Worldcom submits that before the FCC could rationally decide whether the IRCs were receiving an unlawful preference from AT&T, the FCC needed, at a minimum, the following information: (a) cost data from AT&T from which would permit the parties to compare AT&T's cost of serving the IRCs and the domestic carriers, and determine whether different rates were justified, (b) a fuller description of the services which AT&T

* Rhode Island Consumers Council v. F.P.C., 504 F.2d 203, 210 (D.C. Cir. 1974); Appalachian Power Co. v. E.P.A., 477 F.2d 495, 500-501 (4th Cir. 1973); City of Chicago v. F.P.C., 458 F.2d 731, 743-44 (D.C. Cir. 1971), cert. den., 405 U.S. 1074 (1972); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971).

** Accord, Rhode Island Consumers Council v. F.P.C., 504 F.2d 203, 210 (D.C. Cir. 1974); Office of Communications of United Church of Christ v. F.C.C., 425 F.2d 543 (D.C. Cir. 1969).

was providing the domestic carriers, which would make it possible to decide whether those services were "like" the services being provided the IRCs, and (c) comments from the domestic carriers describing the impact, if any, of the purported "discrimination" on their business, which would indicate whether the effect of the alleged discrimination was "unreasonable" within the meaning of Section 202(a) of the Communications Act. However, none of this information was before the FCC, and the record below was therefore obviously incomplete.*

Under these circumstances, the FCC's "affirmative duty" to develop an adequate record required it to elicit this essential information from the various carriers.** The FCC has more than adequate statutory power to permit it to do so.*** The FCC could have made the domestic carriers parties to its proceeding, and it could have directed them to file comments and other information just as the IRCs did. The Commission has indicated that it intends to investigate AT&T's

* Since the record was incomplete, the FCC's Order and Decision were not supported by substantial evidence, as the other petitioners' joint brief points out.

** See National Association of Indep. Tel. Prod. & Dis. v. F.C.C., 502 F.2d 249, 257 (2nd Cir. 1974); Alabama Power Co. v. F.P.C., 511 F.2d 383, 393 (D.C. Cir. 1974).

*** By contrast, the IRCs - on which the FCC erroneously placed the burden of proof - have no practical way of compelling AT&T and the domestic carriers to provide the information necessary to complete the record.

costs for its services to other carriers, (JA 720), and it could easily have sought such data before, rather than after, it made its decision here. The Court should therefore vacate the FCC's Order and Decision and remand the matter to the FCC for further consideration after supplementation of the record. Anglo-Canadian Shipping Co., Ltd. v. F.M.C., 310 F. 2d 606, 613, 618 (9th Cir. 1962).

B. The FCC Has Erroneously Placed
The Burden on the IRCs to Prove
Matters Beyond Their Knowledge

The joint brief argues that the FCC, and not the IRCs should have borne the burden of proof on the issue of whether AT&T's rates to the IRCs were discriminatory. ITT Worldcom submits that whatever the general rule may be, the FCC erred here when it required the IRCs to bear the burden of proving that the rates they were receiving were justified, because the IRCs had no access to the evidence which was necessary to meet that burden. Compare, Office of Communications of United Church of Christ v. F.C.C., 425 F.2d 543, 547 n. 8 (D.C. Cir. 1969), with Copley Press, Inc. v. F.C.C., 444 F.2d 984, 988 (D.C. Cir. 1971). Obviously, the IRCs have no knowledge of AT&T's costs of service, nor do they know what facilities AT&T is providing the domestic carriers. As discussed above, the FCC was obligated to use its statutory powers to obtain this information from AT&T and the domestic carriers. Assuming that the FCC could properly have placed the burden of analyzing and

organizing this information on the IRCs after it had been placed in the record, it was clearly reversible error and an abuse of discretion to place the burden of proof on the IRCs when they were not given access to this basic economic and technical data.

C. The FCC's Remedy for the "Discrimination" It Purportedly Found Was Erroneous and Unsupported By The Necessary Findings.

Assuming arguendo that the FCC properly found that AT&T's charges to the IRCs were discriminatory, it does not follow that the FCC had unlimited discretion to decide how to deal with that "discrimination." Any remedy which an agency adopts must be rationally related to the problem the agency is attempting to solve, and must be supported by findings which demonstrate that the agency has made the appropriate choice among the alternative solutions which are presented. As the Supreme Court has observed:

"The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. The assumption of the Commission was that the deficiencies of service made either of two remedies available . . .

* * *

"The agency must make findings that support its decision, and those findings must be supported by substantial evidence. Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different

consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 165, 168 (1962) (citations omitted, emphasis supplied).*

Assuming the FCC properly found that AT&T's services to the IRCs and the domestic carriers were "like" services which must be offered at the same rates, the FCC had several options which could have been adopted to equalize the rates paid by the two groups of carriers. The FCC could: (a) raise the IRCs' rates to the levels paid by the domestic carriers, as it in fact did, (b) lower the domestic carriers' rates to match the IRCs' rates, or (c) establish a new rate at some other reasonable level.** In the absence of any cost

* See also, Marine Space Enclosure, Inc. v. F.M.C., 420 F.2d 577, 585 (D.C. Cir. 1969); City of Huntingburg v. F.P.C., 498 F.2d 778, 788 (D.C. Cir. 1974); Citizens for Allegan County, Inc. v. F.P.C., 414 F.2d 1125, 1133 (D.C. Cir. 1969).

** The FCC would argue that it left the choice among these options to AT&T. As demonstrated in the other petitioners' joint brief, AT&T was given no practical alternative other than to file tariffs raising its rates to the IRCs to equal those charged the domestic carriers. Nor did AT&T have any economic incentive to do anything other than maximize its revenues by increasing its charges to the IRCs. Moreover, even if the FCC had given AT&T a real choice as to the rates it would include in the tariffs it originally filed with the FCC, it was the FCC's responsibility to decide what rates would actually be charged (since the FCC has statutory responsibility to assure that rates charged by regulated carriers are just and reasonable. Communications Act, §204, §205).

dat from AT&T, the FCC had no rational basis for deciding that AT&T must raise the IRCs' rates rather than lower the domestic carriers' rates.*

Under the circumstances, the only reasonable approach open to the FCC was to maintain the status quo until it could determine a reasonable rate for the services which AT&T was providing to the IRCs and the domestic carriers. This is precisely the approach which the FCC followed in a closely similar case. Bell System Tariff Offerings, 46 F.C.C. 2d 413, 434-35 (1974), aff'd., Bell Telephone Co. of Pennsylvania v. F.C.C., supra. In that proceeding, the FCC had before it a contract pursuant to which Western Union Telegraph Company received interconnection circuits from AT&T. The contract provided Western Union with lower charges for these services than the rates which AT&T offered, pursuant to tariff, to the other domestic carriers. Unlike the instant case, this disparity in rates presented a significant competitive danger to the other domestic carriers which, although they do not compete with the IRCs, do compete with Western Union. 46 F.C.C.2d at

* The FCC implicitly admitted that it had no basis for choosing among these options in its Order when it indicated it would initiate a further investigation to determine the lawfulness of the rates AT&T charges the other carriers. (JA 720)

434-35. Nevertheless, the FCC recognized that it did not have sufficient economic data to determine whether AT&T's lower charges to Western Union were justified, or to decide whether Western Union's rate should be increased or the domestic carriers' rates should be lowered if it ultimately appeared that the two rates should be the same. Therefore, despite the possibility of competitive injury to the domestic carriers, the FCC maintained the status quo and let Western Union's contract remain in effect pending a further investigation which would establish reasonable rates for all carriers. 46 F.C.C.2d at 435.*

* The FCC's opinion in Bell System Tariff Offerings describes the procedure necessary to make a rational determination of whether, and how, a disparity in rates should be eliminated, as follows:

"This proceeding, however, is not the appropriate vehicle for determining the validity of Bell's rates for services to either Western Union or to the other carriers since such an investigation would necessarily involve a thorough exploration of matters and issues which are well beyond the scope of this proceeding. Thus, in order to determine whether the contract or tariff rates are unreasonably high, unreasonably low, or otherwise discriminatory, we must ascertain and compare the nature of the facilities and services provided to Western Union and the other carriers, whether circumstances exist which justify different charges to different carriers, and consider all other facts and circumstances submitted by the parties which are deemed relevant to the resolution of the questions presented." 46 F.C.C.2d at 435.

ITT Worldcom submits that the FCC should have followed the precedent of Bell System Tariff Offerings, supra, by leaving the IRCs' leases in effect until a further investigation of AT&T's costs, which the Order promises, permits the FCC to determine reasonable rates for AT&T's services to the IRCs and the domestic carriers. The FCC is, in effect, guessing that the higher rates AT&T charges under its domestic carrier tariffs will ultimately prove to be cost-justified when applied to the IRCs' tail circuits. There are no findings in the record to support such speculation,* and the IRCs will be substantially injured if the FCC's guess turns out to be wrong.

The FCC's decision to have AT&T increase its charges to the IRCs is not only unsupported by adequate findings but is also unrelated to the problem the FCC was purporting to remedy. In its Decision and Order, the FCC indicated that its concern was the possibility that AT&T's "discriminatory" rate might injure the domestic carriers which competed with AT&T. (JA 161, JA 704) If, however, AT&T is competing unfairly with the other domestic carriers by overcharging them for interconnection services, the problem will not be solved by increasing

* Indeed, it would seem more likely that AT&T would overcharge its competitors, the domestic carriers, rather than undercharge the independent IRCs.

AT&T's rates to the IRCs' to the same high levels which the domestic carriers are paying. The domestic carriers' ability to compete with AT&T will not be improved in the slightest by the FCC's Decision and Order. To the contrary, AT&T will receive a windfall of approximately \$5 million annually from the IRCs which it can use to compete even more effectively with the domestic carriers.*

Thus, the remedy which the FCC has adopted is both unsupported by the necessary findings and inadequate to eliminate the adverse effects of the "discrimination" the FCC claims to perceive. All that FCC's Decision and Order have accomplished is to satisfy the FCC's determination to force AT&T to include the IRCs' tail circuits in tariffs similar to those which apply to the domestic carriers. However, the FCC's wish to pursue regulatory symmetry for the sake of symmetry alone cannot justify a Decision and Order which serve neither the public interest nor the carriers which the FCC is purporting to regulate.

* Since the domestic carriers are not being benefited by the increases in the IRCs' rates, there is no reason why the FCC should not have left the status quo in effect until it obtained additional data on AT&T's costs.

CONCLUSION

For the reasons stated above and in the other petitioners' joint brief, the FCC's Order and Decision should be reversed, and the tariffs filed by AT&T in response thereto should be held to be void, unlawful and of no effect.

Dated: New York, New York
November 18, 1977

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Petitioner
ITT World Communications Inc.
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

Grant S. Lewis
John S. Kinzey

and

Howard A. White
Joseph J. Jacobs
Randall B. Lowe
ITT World Communications Inc.
67 Broad Street
New York, New York
(212) 797-3300

CERTIFICATE OF SERVICE

I am an attorney associated with the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Petitioner ITT World Communications, Inc. I hereby certify that the foregoing Brief for Petitioner ITT World Communications, Inc. has been served upon all parties to this consolidated review proceeding.

Pursuant to the Court's Order Fixing Briefing Schedule, dated November 10, 1977, the typewritten final draft of the foregoing Brief was served by hand, at my direction, on all parties to the proceeding.

I have this day served the foregoing final bound version of this Brief on all parties, by mailing true copies thereof, first class mail, postage prepaid, to the following persons at the listed addresses.

Alvin K. Hellerstein, Esq.
Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

Attorneys for Petitioner,
Western Union International, Inc.

H. Richard Schumacher, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, New York

Attorneys for Petitioner
RCA Global Communications, Inc.

Jack David Smith, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Attorney for Respondent
Federal Communications Commission

Barry Grossman, Esq.
Appellate Section
Antitrust Division
U.S. Department of Justice
Washington, D.C.

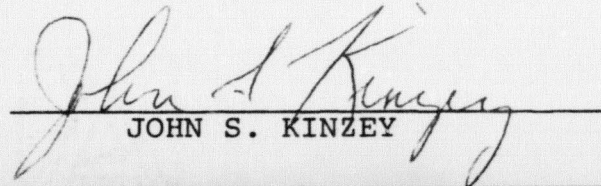
Attorney for Respondent
United States of America

Gerald E. Murray, Esq.
Room 2539
195 Broadway
New York, New York

Attorney for American Telephone
and Telegraph Company

Roderick A. Mette, Esq.
TRT Telecommunications Corporation
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dated: New York, New York
November 22, 1977


JOHN S. KINZEY

